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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 816

THE GOODYEAR TIRE & RUBBER COMPANY, INC., petitioner

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 25) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 14, 1926. (R. 27.) The petitioner filed a motion for a new trial on July 16, 1926, which motion was overruled by the court on October 25, 1926 (R. 27), and the petition for certiorari was filed January 6, 1927. Jurisdiction to issue the writ is conferred upon this Court by Section 3(b) of the Act of February 13, 1925 (c. 229, 43 Stat. 936, 939).

THE QUESTION PRESENTED

The question involved is, Shall the United States be held liable for rent from January 1, 1924, to June 30, 1924, under a lease for four floors of a building located in Ohio, entered into on October 13, 1921, renewed for a term of one year ending June 30, 1923, when, prior to June 30, 1923, it notified the lessor that it would give up the occupancy of the premises as of June 30, 1923, but when June 30, 1923, arrived, the United States still desired to occupy the premises for a while, and so advised the lessor, expressly stating to the lessor at that time that there was no intention on its part to pay rent for any longer time than the actual period of occupancy, and, further, that it did not intend to renew the lease for the next fiscal year, although it continued in possession until December 20, 1923, and paid the rent reserved up to December 31, 1923?

STATEMENT

This case involves a claim for rent from January 1, 1924, to June 30, 1924, amounting to $19,173.60. The Court of Claims sustained a demurrer to the petition.

The petition shows that the Goodyear Tire & Rubber Company, an Ohio corporation, by a lease consummated October 13, 1921, leased to the United States, for the use of the Bureau of War Risk Insurance, certain premises in the city of Cincinnati, Ohio, for a term beginning September 1, 1921, and

ending June 30, 1926, at an annual rental of $33,412.83, and some additional premises for the term from April 1, 1922, to June 30, 1926, at an annual rental of $10,739.75. (R. 6 et seq.) The lease contained the provision (R. 7):

> In the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available.

The Veterans' Bureau, on behalf of the United States, took possession of the leased premises pursuant to this lease. Annually, for fiscal years down to the year ending June 30, 1924, appropriations were made out of which the rent could be paid. (R. 8.) The lease is treated as a lease for the fiscal year in which it was made, with an option to the United States to renew for each fiscal year during the term stated in case appropriations became available.

The Veterans' Bureau remained in possession, and on May 1, 1922, on the theory that the lease was renewable by the United States each fiscal year, the following letter was written by the Veterans' Bureau to the lessor (R. 9):

> MAY 1, 1922.
>
> THE GOODYEAR TIRE AND
> RUBBER COMPANY, INC.,
> *East Market Street, Akron, Ohio.*
>
> GENTLEMEN: In view of the decision of the Attorney General relating to contracts based

on annual appropriations, it is considered necessary to give notice that the United States does hereby renew a certain lease dated August 23, 1921, by and between the United States and the Goodyear Tire and Rubber Company, Incorporated, covering premises described as the entire first, second, third, and fourth floors, containing a total area of approximately 46,476 square feet of floor space in the building located at No. 415 East Sixth Street, Cincinnati, Ohio, for the fiscal year beginning July 1, 1922, and ending June 30, 1923.

Respectfully,

(Sgd.) L. B. ROGERS,
Acting Director U. S. Veterans' Bureau.

Receipt of the above notice is acknowledged and assent is hereby given to the renewal of said lease.

THE GOODYEAR TIRE &
RUBBER COMPANY, INC., *Lessor,*
By G. M. STADELMAN, *Vice President.*

The rent was regularly paid down to June 30, 1923, so that the lease, by virtue of the last renewal, became a lease for a term of one year ending June 30, 1923.

Prior to June 30, 1923, officials of the Veterans' Bureau informed the landlord that the United States would give up occupancy of the premises as of June 30, 1923. It was contended by the Veterans' Bureau that the lease did not extend beyond June 30, 1923, on the theory that there was no authority in the Director of the Veterans' Bureau

to make a lease for more than one fiscal year under the provisions of Section 3679 of the Revised Statutes, as amended by the Act of March 3, 1905 (c. 1484, 33 Stat. 1214, 1257), and by the Act of February 27, 1906 (c. 510, 34 Stat. 27, 48), which provides that—

> No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. * * *

See *Leiter* v. *United States,* 271 U. S. 204, 207.

The landlord contended that the lease extended to June 30, 1926, unless there should be a failure of appropriations, which had not occurred.

When June 30, 1923, arrived the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year. The officials of the Bureau stated, by way of explanation of their holding over, that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the landlord, on the other hand, claimed that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained

in possession longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the law in force in the State of Ohio, as the result of holding over after the expiration of the term. (R. 10.)

The United States remained in possession to December 20, 1923, and vacated the premises on that date, but paid rent at the specified rate to December 31, 1923. The landlord presented a claim for rent for the balance of the period to June 30, 1926, but that claim was rejected and has been abandoned because of the decision in *Leiter* v. *United States, supra,* which disposes of the claim.

This suit is for rent for the period from December 31, 1923, to the end of that fiscal year, June 30, 1924, on the theory that by virtue of the renewal, the lease became one for a term of one year ending June 30, 1923, and by holding over the United States became a tenant for an additional year, and because the landlord was unable to find any other tenant for the period from December 31, 1923, to June 30, 1924.

ARGUMENT

This lease covered premises in the State of Ohio, and, applying the law of the State of Ohio, as announced by the courts of that State, it would follow that a tenant for a term of one year holding over after the expiration of his term, without a new agreement, might be treated by the landlord either as a tenant at sufferance or as a tenant from year to year, and this, without regard to the desires or

intention of the tenant, and irrespective of the fact that the tenant before holding over declared to the landlord that he would only be bound for such length of time as he remained in possession.

There is no statute in the State of Ohio modifying the common law applicable to a situation where the lessee holds after the expiration of a definite term, and the law of Ohio is to be found in the common law as announced by the courts of that State. The courts of that State have said:

> A tenant in possession under a lease, who holds over after the termination of the time for which the premises were let to him, without any new demise, may be treated either as a tenant at sufferance or as a tenant from year to year. If the landlord sees fit to require his immediate removal, he may do so, treating him as a tenant at sufferance; or the landlord may treat him as a tenant from year to year, and require the payment of rent for a yearly period. The intention of the tenant is immaterial, even if the landlord knows of such intention. (Supp. Page's Ohio Digest, Vol. 3, column 5963.)

Long v. *Kahn,* 19 Ohio Nisi Prius (N. S.) 1; *Kahn* v. *Long,* 95 Ohio State 344; *Walker* v. *Bumiller,* 25 Ohio Circuit Court (N. S.) 385; *Strong* v. *Schmidt,* 15 Ohio Circuit Court, 233.

The Ohio court seems to have followed the decision of the Supreme Court of New York in *Conway* v. *Starkweather,* 1 Denio, 113.

Assuming that the case is to be governed by the law of Ohio, and that the United States is in the same position as a private corporation would be under like circumstances, we would have no ground to contend that by holding over after the expiration of the one-year term ending June 30, 1923, the United States did not, by virtue of the election of the landlord, become obligated for a term of one year ending June 30, 1924, but there is another point in the case which may be advanced to support the judgment of the Court of Claims.

The Act relied on to give the Court of Claims jurisdiction of a suit against the United States on this claim gives jurisdiction in cases of contract express or implied. There was no express contract in this case binding the United States to pay rent for the full year ending June 30, 1924. On the contrary, the United States, at the time of the expiration of the original term, expressly rejected the proposition that it would become liable for the additional term of one year. The question remains whether there was an implied contract within the meaning of the jurisdictional statute relating to the Court of Claims. This Court has often said that an implied contract, under this jurisdictional statute, must be one implied in fact and not by operation of law. *Tempel* v. *United States,* 248 U. S. 121; *Ball Engineering Co.* v. *White & Company,* 250 U. S. 46, 57; *Horstmann Co.* v. *United States,* 257 U .S. 138, 146; *Klebe* v. *United States,* 263 U. S., 188, 192.

The question left is whether the obligation imposed on the tenant holding over, by the technical rule of the law of landlord and tenant above referred to, and in the face of an affirmative declaration by the tenant that it would only be bound for the period it remained in possession, results from a contract implied in fact.

If the tenant holds over after the expiration of his term without anything being said by him or his landlord respecting the nature of the resulting obligation, a contract for the additional term may be one implied in fact, on the theory that the situation and conduct of the parties shows a real intention that the tenant shall become a tenant for an additional term of one year; but this can not be so where the tenant at or before the time when their holding over commences, expressly declares to his landlord that he intends to be bound only for the length of time he remains in possession. The theory of the rule making the tenant liable at the option of the landlord for an additional term of one year, nothwithstanding the tenant has protested in advance, he will not be so liable, has been dealt with in *Tiffany,* Landlord and Tenant, Vol. 2, p. 1472, where it is said:

> It has been suggested that this option in the landlord is to be regarded as based on the theory that the tenant holding over presumably intends to hold for another term or period, and that he can not overthrow this presumption by asserting, to the disadvan-

> tage of the landlord, that he is holding as a wrongdoer. There seems, however, no advantage in introducing such a theory, and it is more satisfactory to regard this as "one among the cases where a person may be charged, as upon a contract, without his consent, and contrary to his intention." In other words, the tenant is liable for further rent upon the principle, not of contract, but of *quasi* contract. That this is the character of the liability plainly appears from the fact that it exists in spite of any statements by the tenant evidencing a contrary intention.

See *Clinton Wire Cloth Co.* v. *Gardner,* 99 Ill. 151.

In *Herter* v. *Mullen,* 159 N. Y. 28, it was said:

> The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as the duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law, and in no sense upon an express or absolute contract.

Having in mind the foundation for the obligation imposed by the law of landlord and tenant in such cases and that this Court has consistently held that, under the Act granting jurisdiction to the Court of Claims, a contract implied must be one

implied in fact from circumstances from which the intention of the United States to pay may be presumed, there is substantial ground to support the judgment of the Court of Claims, because of the fact that in this case the intention of the United States not to pay beyond the time it remained in possession was clearly and plainly expressed. No doubt the Court of Claims had this point in mind in disposing of the case in the way it did.

Without pursuing the subject further, it may be said that this case involves no principle of any general importance. The law of landlord and tenant in the State of Ohio is not a subject inviting attention from this Court. In most States of the Union statutes have been enacted which would prevent any such question as is here presented from arising in cases of leases to the United States and which prescribe that in case of a holding over, where the creation of tenancy at will has resulted, notice to quit is sufficient if given for thirty or sixty days. See *Leavitt* v. *Maykel,* 203 Mass. 506, 509.

In this case the landlord has been paid for somewhat more than the length of time the United States remained in possession. It had notice of the position of the United States as early as June 30, 1923. It knew then that the United States intended to pay only for the time it remained in possession. Admittedly, under the law of Ohio, the landlord then could have elected to treat the United States as a tenant at sufferance and required it to

immediately remove. Instead, it chose to allow the United States to remain. The landlord took its chances on being able to hold the United States for the full year. It was no doubt glad to have the United States remain as long as it did.

Under all the circumstances, there is substantial ground for supporting the judgment of the Court of Claims. There is no reason to believe that justice has not been done, and the case is not of such a nature as to justify consideration from this Court, and the petition for certiorari should be denied.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
JAMES J. LENIHAN,
JOHN E. HOOVER,
Attorneys.

MARCH, 1927.

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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 159

THE GOODYEAR TIRE & RUBBER COMPANY, INC., petitioner

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 25) is reported, 62 Ct. Cls. 370.

JURISDICTION

The judgment of the Court of Claims was entered June 14, 1926. (R 27.) The petitioner filed a motion for a new trial on July 16, 1926, which motion was overruled by the court on October 25, 1926. (R. 27.) The petition for certiorari was

filed January 6, 1927, and granted April 11, 1927. Jurisdiction to issue the writ is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The question involved is, Shall the United States be held liable for rent from January 1, 1924, to June 30, 1924, under a lease for four floors of a building located in Ohio, entered into on October 13, 1921, renewed for a term of one year ending June 30, 1923, when, prior to June 30, 1923, it notified the lessor that it would give up the occupancy of the premises as of June 30, 1923, but when June 30, 1923, arrived, the United States still desired to occupy the premises for a while, and so advised the lessor, expressly stating to the lessor at that time that there was no intention on its part to pay rent for any longer time than the actual period of occupancy, and, further, that it did not intend to renew the lease for the next fiscal year, although it continued in possession until December 20, 1923, and paid the rent reserved up to December 31, 1923?

STATEMENT

This case involves a claim for rent from January 1, 1924, to June 30, 1924, amounting to $19,173.60. The Court of Claims sustained a demurrer to the petition.

The petition shows that the Goodyear Tire & Rubber Company, an Ohio corporation, by a lease

consummated October 13, 1921, leased to the United States, for the use of the Bureau of War Risk Insurance, certain premises in the city of Cincinnati, Ohio, for a term beginning September 1, 1921, and ending June 30, 1926, at an annual rental of $33,412.83, and some additional premises for the term from April 1, 1922, to June 30, 1926, at an annual rental of $10,739.75. (R. 6 et seq.) The lease contained the provision (R. 7):

> in the event an appropriation is not made from which rent hereunder for any succeeding fiscal year may be paid, this agreement shall automatically terminate as of June 30th of the fiscal year for which an appropriation is last available.

The Veterans' Bureau, on behalf of the United States, took possession of the leased premises pursuant to this lease. Annually, for fiscal years down to the year ending June 30, 1924, appropriations were made out of which the rent could be paid. (R. 8.) The lease is treated as a lease for the fiscal year in which it was made, with an option to the United States to renew for each fiscal year during the term stated in case appropriations became available.

The Veterans' Bureau remained in possession, and on May 1, 1922, on the theory that the lease was renewable by the United States each fiscal year, the following letter was written by the Veterans' Bureau to the lessor (R. 9):

MAY 1, 1922.

THE GOODYEAR TIRE AND
RUBBER COMPANY, INC.,
East Market Street, Akron, Ohio.

GENTLEMEN: In view of the decision of the Attorney General relating to contracts based on annual appropriations, it is considered necessary to give notice that the United States does hereby renew a certain lease dated August 23, 1921, by and between the United States and the Goodyear Tire and Rubber Company, Incorporated, covering premises described as the entire first, second, third, and fourth floors, containing a total area of approximately 46,476 square feet of floor space in the building located at No. 415 East Sixth Street, Cincinnati, Ohio, for the fiscal year beginning July 1, 1922, and ending June 30, 1923.

Respectfully,

(Sgd.) L. B. ROGERS,
Acting Director U. S. Veterans' Bureau.

Receipt of the above notice is acknowledged and assent is hereby given to the renewal of said lease.

THE GOODYEAR TIRE &
RUBBER COMPANY, INC., *Lessor,*
By G. M. STADELMAN, *Vice President.*

The rent was regularly paid down to June 30, 1923, so that the lease, by virtue of the last renewal, became a lease for a term of one year ending June 30, 1923. (R. 9.)

Prior to June 30, 1923, officials of the Veterans' Bureau informed the landlord that the United

States would give up occupancy of the premises as of June 30, 1923. (R. 9.) It was contended by the Veterans' Bureau that the lease did not extend beyond June 30, 1923, on the theory that there was no authority in the Director of the Veterans' Bureau to make a lease for more than one fiscal year under the provisions of Section 3679 of the Revised Statutes, as amended by the Act of March 3, 1905, c. 1484, 33 Stat. 1214, 1257, and by the Act of February 27, 1906, c. 510, 34 Stat. 27, 49 (U. S. C., Title 31, Sec. 665), which provides that:

> No Executive Department or other Government establishment of the United States shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law. * * *

See *Leiter* v. *United States,* 271 U. S. 204, 207.

The landlord contended that the lease extended to June 30, 1926, unless there should be a failure of appropriations, which had not occurred. (R. 10.)

When June 30, 1923, arrived the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year. (R. 10.) The officials of the Bureau then stated that there was no intention on the part of the United States to pay rent for any longer time than the actual

period of occupancy, and the landlord, on the other hand, stated that it was its contention that the term of the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained in possession longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the law in force in the State of Ohio, as the result of holding over after the expiration of the term. (R. 10.)

The United States remained in possession to December 20, 1923, and vacated the premises on that date but paid rent at the specified rate to December 31, 1923. (R. 10.) The landlord abandoned its claim for rent to June 30, 1926, because of the decision in *Leiter* v. *United States,* 271 U. S. 204, but claimed rent to June 30, 1924, which claim was rejected by the Comptroller General, 5 Dec. Compt. Gen., 172. This suit was thereupon brought on the theory that by holding over after June 30, 1923, the United States became liable for rent as a tenant for an additional year.

THE CONTENTION OF THE UNITED STATES

The United States claims that it is not liable upon implied contracts, except those implied in fact, and that the liability for an additional year's rent imposed by law upon the tenant holding over is not of that character.

ARGUMENT

I

THE UNITED STATES IS NOT LIABLE UPON IMPLIED CONTRACTS, EXCEPT THOSE IMPLIED IN FACT

The lease terminated on June 30, 1923. *Leiter* v. *United States,* 271 U. S. 204. In that case this Court said, at page 207:

> A lease to the Government for a term of years, when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year. *McCollum* v. *United States,* 17 Ct. Cls. 92, 104; *Smoot* v. *United States,* 38 Ct. Cls. 418, 427. And it is plain that, to make it binding for any subsequent year, it is necessary, not only that an appropriation be made available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year.

Prior to that date the Veterans' Bureau notified the landlord that the United States would give up occupancy of the premises as of June 30, 1923, thus plainly showing that there was no intention to renew the lease. Assuming the law of Ohio to be that, under the circumstances, a privatae corporation holding over would be held liable for a year's

rent, no such liability can be inferred against the United States. Such liabilities do not arise from contracts implied in fact but from contracts implied in law, or such as are now more generally called *quasi* contracts. For such liabilities the United States has never consented to be sued and no court has jurisdiction to render a judgment founded thereon.

This principle has been affirmed and reaffirmed so many times and applied to so many varying states of fact that it is no longer open to question.

United States v. *North American Company*, 253 U. S. 330.

United States v. *Buffalo Pitts Co.*, 234 U. S. 228.

Tempel v. *United States*, 248 U. S. 121.

Ball Engineering Company v. *White & Co.*, 250 U. S. 46.

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Merritt v. *United States*, 267 U. S. 338.

United States v. *Minn. Investment Co.*, 271 U. S. 212.

Livingston v. *United States*, 273 U. S. 648.

See also dissenting opinion of Mr. Justice Brandeis in *Portsmouth Company* v. *United States*, 260 U. S. 327, 330.

Thus in *United States* v. *Minn. Investment Co.*, 271 U. S. 212, Mr. Chief Justice Taft, speaking for the Court said, at page 217:

> An implied contract in order to give the Court of Claims or a district court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law. *Merritt* v. *United States,* 267 U. S. 338, 340, 341; *Tempel* v. *United States,* 248 U. S. 121; *Sutton* v. *United States,* 256 U. S. 575, 581.

In *Sutton* v. *United States*, 256 U. S. 575, the rule was stated as follows, at page 581:

> For the right to sue the United States in the Court of Claims here invoked must rest upon the existence of a contract express or implied in fact. *United States* v. *North American Transportation & Trading Co.,* 253 U. S. 330, 335.

And in *Merritt* v. *United States,* 267 U. S. 338, this Court said, at page 341:

> The Tucker Act does not give a right of action against the United States in those cases where, if the transaction were between private parties, recovery could be had upon a contract implied in law. *Tempel* v. *United States,* 248 U. S. 121; *Sutton* v. *United States,* 256 U. S. 575, 581. * * *

No agreement of the parties is alleged in the petition nor are facts alleged from which any such agreement can be inferred as a fact. Prior to

June 30, 1923, the officials of the Veterans' Bureau informed the claimant company that the United States would give up occupancy of the demised premises as of June 30, 1923. (R. 9–10.)

> It was contended by the representatives of the Veterans' Bureau that the lease in question did not extend beyond June 30, 1923, on the theory that there had been no authority in the Director of the Veterans' Bureau to make a lease for more than one fiscal year. Representatives of the claimant contended that the lease extended to June 30, 1926, unless there should be a failure of appropriations, which had not been the case. When June 30, 1923, arrived the officials of the Veterans' Bureau desired to occupy the premises beyond that date, and possession was continued by the United States into the following fiscal year, the officials of the Veterans' Bureau then stating that there was no intention on the part of the United States to pay rent for any longer time than the actual period of occupancy, and the officials of the claimant company stating that it was their contention that the lease extended to June 30, 1926, and that even if the original lease was not binding beyond June 30, 1923, nevertheless if the United States remained longer than June 30, 1923, it would at least be liable for the stipulated rent for the year ending June 30, 1924, under the laws of the State of Ohio by reason of holding over.

We are not called upon to decide what, if any, contract might have been implied in fact if with-

out saying anything about it the Veterans' Bureau had merely held over after June 30th; or if prior to June 30th the landlord had notified the officials of the Bureau that they must vacate on June 30th, unless they wished to renew for another year, and without doing or saying anything further they had continued their occupancy. No such facts are alleged in the petition. It was distinctly stated by the Government officials that the United States would give up occupancy of the premises, and thereafter that they desired to occupy the premises beyond that date but had no intention of paying rent for any longer time than the actual period of occupancy. These facts are distinctly alleged, and they show affirmatively that there was no agreement to the contrary. Beyond this, the allegation is merely of a discussion of propositions of law upon which there was a difference of opinion.

But, as stated by Mr. Justice Brandeis in his dissenting opinion in *Portsmouth Co.* v. *United States,* 260 U. S. 327, at page 332:

> Implied contracts in fact do not arise from denials and contentions of parties, but from their common understanding whereby mutual intent to contract without formal words therefor is shown. *Farnham* v. *United States,* 240 U. S. 537; *E. W. Bliss Co.* v. *United States,* 253 U. S. 187, 190, 191; *Knapp* v. *United States,* 46 Ct. Clms. 601, 643.

See also *Newmarket Manufacturing Company* v. *Coon,* 150 Mass. 566.

II

THE LIABILITY IMPOSED BY LAW UPON A TENANT HOLDING OVER DOES NOT RESULT FROM A CONTRACT IMPLIED IN FACT

The question remaining is whether the obligation imposed on a tenant holding over by the technical rule of the law of landlord and tenant results from a contract implied in fact. It is plain that it does not.

A contract implied in fact is a true contract, an agreement of the parties being inferred from the circumstances, while a contract implied in law is a duty imposed by law and treated as a contract for the purposes of a remedy only. *Harley* v. *United States,* 198 U. S. 229; *The Columbus, Hocking Valley & Toledo Railway Co.* v. *Gaffney,* 65 Ohio St. 104.

In the latter case the Court said, 65 Ohio St., at page 113:

> There is some confusion in the statement of the law applicable to what are frequently called implied contracts, arising from the fact that obligations generically different have been classed as such, not because of any real analogy, but because where the procedure of the common law prevails, by the adoption of a fiction in pleading—that of a promise where none in fact exists or can in reason be supposed to exist—the favorite remedy of implied assumpsit could be adopted. * * * But contracts that are true contracts are

> frequently termed implied contracts, as, where from the facts and circumstances, a court or jury may fairly infer, as a matter of fact, that a contract existed between the parties, explanatory of the relation existing between them. Such implied contracts are not generically different from express contracts; the difference exists simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, whilst in the other case the terms are inferred as a matter of fact from the evidence offered of the circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding. In such cases no fictions are, or can be, indulged. The evidence must satisfy the court and jury, that the parties understood that each sustained to the other a contractual relation; and that by reason of this relation the defendant is indebted to the plaintiff for services performed or for goods sold and delivered.

Contracts implied in law are a class of obligations imposed or created by law without regard to the assent of the party bound. *Steamship Company* v. *Joliffe,* 2 Wall. 450. See also 13 *Corpus Juris,* 240.

The liability of a hold-over tenant belongs to this class.

In *Tiffany, Landlord and Tenant,* Vol. 2, p. 1472, it is stated:

> It has been suggested that this option in the landlord is to be regarded as based on the

> theory that the tenant holding over presumably intends to hold for another term or period, and that he can not overthrow this presumption by asserting, to the disadvantage of the landlord, that he is holding as a wrongdoer. There seems, however, no advantage in introducing such a theory, and it is more satisfactory to regard this as "one among the cases where a person may be charged, as upon a contract, without his consent, and contrary to his intention." In other words, the tenant is liable for further rent upon the principle, not of contract, but of *quasi* contract. That this is the character of the liability plainly appears from the fact that it exists in spite of any statements by the tenant evidencing a contrary intention.

See also *Clinton Wire Cloth Co.* v. *Gardner,* 99 Ill. 151.

In *Herter* v. *Mullen,* 159 N. Y. 28, it was said, at page 42:

> The basis of this liability is often said to be an implied agreement upon the part of the tenant to hold for another year. While I doubt, as I always have, the propriety of calling this class of obligations implied contracts, but think they are to be regarded as duties which the law imposes, yet, whether they be denominated implied contracts or duties created by law, in either case the right arises upon an implication of law and in no sense upon an express or absolute contract.

In *U. M. Realty & Imp. Co.* v. *Roth*, 193 N. Y. 570, 576, the court, by Chief Judge Cullen, said that—

> the right of the landlord to treat the holdover as a tenant for a new term does not spring from the contract of the parties but is the penalty imposed by law upon the trespassing tenant.

Of course the United States is not liable for penalties imposed for tortious acts.

According to all the authorities the landlord has an option either to treat the tenant holding over as a trespasser or, waiving the tort, to hold him liable for another year, but no right of action against the United States in contract can be created by waiving a tort. *Bigby* v. *United States*, 188 U. S. 400, 409.

It is, of course, true that when a contract has in fact been made between the United States and one of its citizens, the interpretation of the contract is governed by the same rules as govern contracts between other parties. For instance, in every lease there is, unless excluded by some express covenant, an implied obligation on the part of the lessee so to use the property as not unnecessarily to injure it, and this implied obligation is part of the contract as much as if incorporated by express language. It results from the relation of landlord and tenant between the parties which the contract creates. *United States* v. *Bostwick*, 94 U. S. 53. But first, however, the existence of the contract must be found

as a fact. That was what was done in the *Bostwick case*. Having determined that a contract had been made, equivalent for the purposes of the action to a lease duly executed, this Court said, at page 66:

> Such being the agreement of the parties, it remains only to consider the questions arising under it, as they appear in the record.

In each of the cases in the Court of Claims, cited in appellant's brief (*McCollum* v. *United States*, 17 C. Cls. 92; *Connecticut Mutual Life Insurance Co.* v. *United States*, 21 C. Cls. 195; *Smoot* v. *United States*, 38 C. Cls. 418), the facts found showed an existing contract and the questions were as to the incidents arising therefrom. Thus, in the *Connecticut Mutual Life Insurance Company case*, the effect of a fire occurring in the demised premises upon the tenant's liability for rent was involved, and in the *Smoot case* the premises were abandoned by the tenant before the expiration of an existing term.

Such is not the present case, however, and the error of the petitioner's argument consists in begging the question by first assuming the existence of a contract implied in fact and then drawing implications which might be warranted if the contract existed. The lease terminated on June 30, 1923, and would not be binding for another year, unless the authorized officers of the Government affirmatively exercised their option to renew. *Leiter* v. *United States*, 271 U. S. 204. Had they, with-

out saying more, continued to occupy the premises and pay the same rent, it might have been found as a fact that they intended to exercise that option (*McCollum* v. *United States, supra; Smoot* v. *United States, supra*), but that is not what happened. They refused definitely to exercise the option, and in the face of that definite refusal no liability for another year could arise except upon the theory of a *quasi* contract, or upon the theory of a penalty imposed for a tort.

III

The judgment of the Court of Claims should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

JANUARY, 1928.

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